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Supreme Court of the United States

OCTOBER TERM, ~~1929~~. 1930.

No. ~~623~~.39.

RUSSIAN VOLUNTEER FLEET, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR PETITIONER.

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SUBJECT INDEX.

		PAGE.
I.	THE OPINION OF THE COURT BELOW	1
II.	JURISDICTION	1
III.	STATEMENT OF THE CASE	2
IV.	SPECIFICATION OF ERRORS	6
V.	ARGUMENT	7
	Summary of Argument	7
	A. The Petitioner Is a Juristic Person With Capacity to Sue	8
	B. This Suit Is Properly Brought Under the Act of June 15, 1917	10
	C. The Right to Sue the United States Under the Act of June 15, 1917, Is Not Limited by the Provisions of Section 155 of the Judicial Code	12
	(1) The Act Must Be So Construed as to Harmonize With the Fifth Amendment	13
	(2) The Act Must Be So Construed as to Harmonize With the Principles of Statutory Construction Adopted by This Court in Considering Similar Legislation	20
	D. Section 155 of the Judicial Code Does Not Limit the Right to Sue the United States to Citizens of Recognized Governments	23
	E. If Petitioner's Right Is Dependent Upon Section 155 of the Judicial Code, Petitioner Should Be Permitted to Establish as a Matter of Fact That the Present Russian Government Allows Suits to Be Brought Against It by Citizens of the United States	26
	CONCLUSION	34

TABLE OF CASES CITED.

	PAGE.
Baldy v. Hunter, 171 U. S. 388	28
Banque de France v. Equitable Trust Co., 33 Fed. (2d) 202	30
Banque, etc., v. Goukassow, (1925) A. C. 150, (1923) 2 K. B. 682	10
Brooks-Scanlon Corp. v. U. S., 265 U. S. 106	13
Byrnes v. United States, 3 Ct. Clms. 195	21
Consul of Spain v. La Conception, Fed. 3137	27
Houston Coal Co. v. United States, 262 U. S. 361	11
Joint Stock Co. of Volgakama and Chemical Factory v. Nat. City Bank, 240 N. Y. 368	29
Jones v. United States, 137 U. S. 202	32
Kennett v. Chambers, 14 How. 38	32
Lehigh Valley R. R. Co. v. State of Russia, 21 Fed. (2d) 396, 275 U. S. 571	9
MacLeod v. United States, 299 U. S. 416	28
Matter of Penza, 277 Fed. 91	32
McElhouse's Case, 3 Ct. Clms. 240	22
Nassau Smelting Works v. United States, 266 U. S. 101	21
Nankivel v. Omsk All Russian Government, 237 N, Y. 150	29
Petrogradsky W. K. Bank v. Nat. City Bank, 253 N. Y. 23	10, 29
Phelps v. United States, 274 U. S. 341	17
Richmond Screw Anchor Co. v. United States, 275 U. S. 331	18
Rossia Ins. Co. v. The United States, 58 Ct. of Clms. 180 (1923)	30

PAGE.

Russian C. & I. Bank v. Comptoir d'Escompte de Mulhouse, (1925) A. C. 112, (1923) 2 K. B. 630 10

Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149 29

Russian Government v. Lehigh Valley R. Co., 293 Fed. 133; 293 Fed. 135; 265 U. S. 573 9

Seaboard Air Line v. United States, 261 U. S. 299 ..... 11, 14

Sokoloff v. Nat. City Bank, 239 N. Y. 158 29

Texas v. White, 7 Wall. 700 ..... 9, 28

The Neuva Anna, 6 Wheaton 193 32

Thorington v. Smith, 8 Wall. 1 28

Three Friends, 166 U. S. 1 24

Truax v. Raich, 239 U. S. 33, 39 17

United States v. Russian Volunteer Fleet, 22 F. (2d) 187 8

United States v. Carver, 278 U. S. 294 ..... 2, 11

United States v. McNeil & Sons, 267 U. S. 302 11

United States v. Pfitsch, 256 U. S. 547, 553 ..... 20, 21

United States v. Skinner & Eddy Corp., 35 Fed. (2d) 889 21

United States v. Palmer, 3 Wheaton 610 ..... 27, 32

United States v. Insurance Companies, 22 Wall. 99 28

Vilas v. Manila, 220 U. S. 345 9

Waltjen's Case, 3 Ct. Clms. 238 22

Williams v. Bruffy, 96 U. S. 176 28

Wong Wing v. United States, 163 U. S. 228, 242 17

Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N. Y. 372 28

Yrissari v. Clement, 3 Bing. 432 28

TABLE OF STATUTES CITED.

	PAGE.
Acts, June 15, 1917, c. 29, 40 Stat. at L. 182	2, 3
Acts, Feb. 13, 1925, c. 229, sec. 3 (b), 43 Stat. at L. 939	2
Acts, August 10, 1917, c. 53, 40 Stat. at L. 276	14
Acts, July 1, 1918, 40 Stat. at L. 704, 705	18
Acts, July 27, 1868, 15 Stat. at L. 243	22
Judicial Code, sec. 155, U. S. C. Tit. 28, sec. 261	5
Revised Statutes, sec. 3477	18
Revised Statutes, sec. 5283	24
10 Stat. at L. 612	21
12 Stat. at L. 820	21

TEXTS.

30 Columbia L. Rev. 226 (Feb. 1930)	31
Connick, The Effect of Soviet Decrees in American Courts, 34 Yale L. J. 499	31
Dickinson, The Unrecognized Government or State in English and American Law, 22 Mich. L. R. 29	31
Fraenkel, The Juristic Status of Foreign States, etc., 25 Col. L. R. 544	31
35 Harvard L. R. 607, 768; 37 Id. 606; 38 Id. 816, 832; 41 Id. 102	31
Hervey, Legal Effects of Recognition in International Law (1929)	31
Houghton, The Validity of the Acts of Unrecognized Governments, etc., 13 Minn. L. R. 216	31
35 Yale L. J. 98, 150 at 155	31

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I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Claims was rendered on April 1, 1929, and has not yet been officially reported. It is printed in the Petition and Transcript of Record at pp. 35-38.

II.

JURISDICTION.

This suit was brought in the Court of Claims by the petitioner against the United States to recover the value of two contracts, requisitioned by the United States Shipping Board Emergency Fleet Corporation on August 16,

1917, in the exercise of the powers conferred upon the President by Acts, June 15, 1917, c. 29, "Emergency Shipping Fund," 40 Stat. at L. 182, and by him delegated to the Fleet Corporation by executive order dated July 11, 1917. The case is here on writ of certiorari, granted by this Court on April 21, 1930 (R., p. 41), pursuant to the express provisions of U. S. C. Tit. 28, Sec. 288 (b) (Acts, February 13, 1925, c. 229, Sec. 3, (b), 43 Stat. at L. 939).

The judgment below was rendered on April 1, 1929, finally dismissing the petition (R., p. 39). A motion for a new trial was duly filed and was overruled on November 4, 1929 (R., pp. 39-40). The petition for a writ of certiorari was filed on February 3, 1930 (R., p. 39).

The case falls within the express provision of the statute authorizing this Court to review on certiorari, final judgments of the Court of Claims. *United States v. Carver*, 278 U. S. 294. Reference is also made to the brief heretofore filed on behalf of the petitioner in support of the writ of certiorari.

III.

STATEMENT OF THE CASE.

The petitioner has been since 1917 and is now a corporation organized and existing under the laws of Russia (R., pp. 7, 15).

On August 16th, 1917, the United States Shipping Board Emergency Fleet Corporation requisitioned from the petitioner contracts for the building of two vessels then under construction at the yards of the Standard

Shipbuilding Company in New York, of which contracts the petitioner was then assignee for value (R., pp. 11-13). The requisition was made in the exercise of the powers conferred upon the President by Acts, June 15, 1917, c. 29, "Emergency Shipping Fund," 40 Stat. at L. 182, and by him delegated to the Fleet Corporation by executive order dated July 11th, 1917 (R., p. 10). The relevant provisions of the Act were set forth in the petition filed in the Court below (R., pp. 8-10), and are as follows:

> "The President is hereby authorized and empowered within the limits of the amounts herein authorized * * *
>
> (b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.* * *
>
> (e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed or any part thereof, or charter of such ship. * * *
>
> Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sums as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time; Provided, that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

The word 'person' as used herein, shall include any individual, trustee, firm, association, company, corporation or contractor.

The word 'ship' shall include any boat, vessel, or submarine and the parts thereof."

Although the Fleet Corporation at the time of requisitioning the contracts, recognized the right of your petitioner to compensation (R., pp. 11-13), and has since valued that right at the sum of $1,412,532.35, as of March 5th, 1920 (R., p. 14), no payment has been made to your petitioner of said sum or any part thereof (R., pp. 14-15). The petitioner not being satisfied with the amount of the award made by the Fleet Corporation, and having been refused payment of any part thereof, instituted this suit in the Court of Claims on the 23rd day of March, 1921 (R., p. 7). By leave of Court an amended petition was filed on the 16th day of October, 1924, which contains a full statement of all of the facts in connection with the acquisition by the petitioner of the contracts in question, and their appropriation by the Fleet Corporation (R., pp. 7-33).

No answer to this petition was ever filed on behalf of the United States (R., p. 33), and after the time in which to file such an answer had expired, the petitioner moved for the issuance of commissions to take testimony abroad on certain interrogatories (R., p. 34). Upon objection made by the United States, this motion was overruled (R., p. 34). Thereupon the petitioners served notice upon the United States of its intention to take certain depositions (R., p. 34). To this the United States replied by a motion to quash the notice on the ground that the Court of Claims was without jurisdiction to entertain this suit (R., pp. 34-35). This motion was argued and thereafter a final order was entered dismissing the petition (R., p. 39). A motion for a new trial was filed and overruled (R., p. 39).

In support of its order dismissing the petition, the Court of Claims filed an opinion in which the following propositions were advanced (R., pp. 35-38):

(1) That the right of the petitioner to bring this suit is limited by Section 155 of the Judicial Code (U. S. C., Title 28, Sec. 261), which provides as follows:

> "Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

(2) That the Courts of the United States cannot admit proof of the existence of any foreign government which

the government of the United States has not "recognized" (i. e., with which the Executive Department has not established diplomatic relations).

(3) That in any event the privilege of suing the United States under Section 155 is reserved to citizens of States, the existing governments of which are "recognized" by the Department of State.

In short, the Court of Claims has held that *because the petitioner is a corporation organized under the laws of Russia,* it has no standing to maintain this suit against the United States to recover just compensation for its private property, notwithstanding the explicit provision of the Act of Congress under which that property was taken, that suit might be maintained against the United States in the Court of Claims by *any corporation* to recover such compensation.

IV.

SPECIFICATIONS OF ERRORS.

(1) The Court of Claims erred in dismissing the petition for want of jurisdiction.

(2) The Court of Claims erred in holding that the right of your petitioner to maintain this suit is in any way limited by the provisions of Section 155 of the Judicial Code.

(3) The Court of Claims erred in holding that Section 155 of the Judicial Code properly construed does not authorize a corporation organized under the laws of the State of Russia to maintain suit against the United States in the Court of Claims.

(4) The Court of Claims erred in holding that it was without power to take proof of the existence of a government in Russia and of the existence of a judicial system providing for the prosecution of claims against such government.

V.

ARGUMENT.

SUMMARY.

A. The petitioner is a juristic person with capacity to sue.

B. This suit is properly brought under the Act of June 15, 1917.

C. The right to sue the United States under the Act of June 15, 1917, is not limited by the provisions of Section 155 of the Judicial Code.

(1) The Act must be so construed as to harmonize with the Fifth Amendment.

(2) The Act must be so construed as to harmonize with the principles of statutory construction adopted by this Court in considering similar legislation.

D. Section 155 of the Judicial Code does not limit the right to sue the United States to citizens of recognized governments.

E. If petitioner's right is dependent upon Section 155 of the Judicial Code, petitioner should be permitted to establish as a matter of fact that the present Russian Government allows suits to be brought against it by citizens of the United States.

A.

THE PETITIONER IS A JURISTIC PERSON WITH CAPACITY TO SUE.

The petition filed in the Court of Claims shows that the Russian Volunteer Fleet "is a corporation duly organized under, and by virtue of, the Laws of Russia" (R., p. 7). Paragraph 12 of the petition further alleges that "your petitioner at all times has been a citizen of Russia * * *" (R., p. 15). No point was taken in the Court below that the petitioner was not a juristic person with capacity to sue, nor was any such proposition laid down in the opinion filed in support of the order dismissing the petition. As the case now stands, therefore, no such question is presented to this Court for consideration.

But in any event the point seems to be one of little difficulty. The record shows that the United States dealt with the petitioner as a legal entity and as owner of the property here involved. (See correspondence, R., pp. 11-13). Moreover, on March 5, 1920, a finding was made "that just compensation to the Russian Volunteer Fleet on account of the requisitioning of hulls Nos. 6 and 7 under construction by the Standard Steamboat Corporation in accordance with Requisition Order dated August 3, 1917, be and it is hereby fixed at * * * a total of $1,412,532.35" (R., p. 14). Since that time the United States Government has had numerous dealings with the Russian Volunteer Fleet as such and has even brought suit against the corporation. See *United States v. Russian Volunteer Fleet*, 22 F. (2d) 187.

It has been suggested that the Department of State has recognized the overthrow of the Provisional Government of Russia which succeeded to power at the time of the revolution in 1917, and that this carries with it the extinction of the corporate existence of the petitioner. To this it may be answered that the Department of State still recognizes the representative of that government as the accredited representative of the State of Russia.

But apart from this, it is clear that the overthrow of a government does not carry with it the extinction of private rights. On the contrary, this Court has always held that the great body of municipal law regulating private and domestic rights is presumed to continue in full force and effect until abrogated or changed by the act of a succeeding government, the sovereignty of which is recognized by the Government of the United States. *Vilas v. Manila,* 220 U. S. 345.

That the overthrow of a government does not destroy the State is made clear by the decision of this Court in the case of *Texas v. White,* 7 Wallace, 700, and the continued existence of the State of Russia has been clearly recognized in the recent Lehigh Valley Railroad Company litigation. *Russian Government v. Lehigh Valley R. Co.,* 293 Fed. 133; 293 Fed. 135; Writ of Prohibition denied, 265 U. S. 573; *Lehigh Valley R. R. Co. v. State of Russia,* 21 Fed. (2d) 396; Writ of Certiorari denied, 275 U. S. 571. In those cases it was held that suit could be filed in the courts of the United States on behalf of the State of Russia, notwithstanding the apparent recognition by the Department of State of the fact that the Provisional Government had fallen. The courts

emphasized the distinction between the State of Russia which continues to exist, and the government which has fallen. This recognition of the continued existence of the State carries with it those private rights such as title to real property, corporate existence, etc., which are not necessarily involved in the fall of the government.

It so happens that in this case the petitioner has alleged its continued existence as a corporation under the laws of the Soviet Government, but even were the fact otherwise, as in those cases where the Soviet Government has attempted to destroy the corporate entity, the continued existence of the corporation for the purpose of bringing suit to collect its assets would be presumed by the courts of the United States, in the absence of recognition by the Government of the United States of the validity of the decrees of the Soviet Government. *Petrogradsky W. K. Bank v. Nat. City Bank,* 253 N. Y. 23 (1930); *Russian C. & I. Bank v. Comptoir d'Escompte de Mulhouse,* (1925) A. C. 112, (1923) 2 K. B. 630; *Banque, etc. v. Goukassow,* (1925) A. C. 150, (1923) 2 K. B. 682.

B.

THIS SUIT IS PROPERLY BROUGHT UNDER THE ACT OF JUNE 15, 1917.

The petition in this case is filed pursuant to the provisions of Acts June 15, 1917, c. 29 heretofore quoted. The act specifically provides that any person who is dissatisfied with the amount of just compensation awarded to him, "shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further

sums as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor * * * " (R., p. 9).

In this case the Board of Trustees of the Fleet Corporation acting on behalf of the President made an award but attached thereto the condition "that payment of said just compensation and refund of progress payments to the Russian Volunteer Fleet be withheld pending advice from the Department of State as to how and to whom said money shall be paid." The award further authorized the Comptroller to make payment "to whomsoever the Department of State shall designate as properly and legally entitled thereto" (R., p. 14). Naturally, the Department of State refused to make any such designation and hence, as is alleged in paragraph 11 of the petition, the petitioner has received no part of the amount awarded to it (R., p. 15).

Even though no payment has been made to the petitioner, it is clear under the decisions of this Court, that the remedy provided in the act is broad enough to cover this case. Similar suits have been entertained under this very act, *United States v. Carver*, 278 U. S. 294, and under cognate legislation. *Seaboard Air Line v. United States*, 261 U. S. 299; *Houston Coal Co. v. United States*, 262 U. S. 361; *United States v. McNeil & Sons*, 267 U. S. 302. In the *McNeil Case* the contention was expressly made that the remedies under the act were available only after determination by the President of the value of the property taken, expression of dissatisfaction by the owner, and payment of seventy-five per centum of the de-

termined amount. This Court, speaking through Mr. Justice McReynolds, said (p. 307)

> "Jurisdiction was invoked under the Lever Act. The claim is for something alleged to have been commandeered or requisitioned by the President, as provided by Section 10, and this section confers jurisdiction without qualification upon district courts to hear and determine controversies directly resulting from such action. *Houston Coal Co. v. United States*, 262 U. S. 361, 365.
>
> The allegations of the complaint were sufficient to set out a substantial claim under a federal statute. Accordingly, there was jurisdiction in the court to pass upon the questions so presented. *Binderup v. Pathe Exchange*, 263 U. S. 291, 305."

C.

THE RIGHT TO SUE THE UNITED STATES UNDER THE ACT OF JUNE 15TH, 1917, IS NOT LIMITED BY THE PROVISIONS OF SECTION 155 OF THE JUDICIAL CODE.

The Court of Claims held that aliens whose property was taken by the President, under the Acts of June 15th, 1917, c. 29, are without remedy in the courts of the United States to recover just compensation for their property so taken, unless they can satisfy the condition of Section 155 of the Judicial Code that similar suits may be brought by citizens of the United States against the government of which the aliens in question are citizens, and a *further* condition, *read into* Section 155 by the Court of Claims, that they are the citizens of recognized governments.

The petitioner contends that this construction of the Act of June 15, 1917, is not permissible under the decisions of this Court construing the very legislation in question.

(1) The Act Must Be So Construed As To Harmonize With the Fifth Amendment.

Manifestly this Court will not construe the Act of June 15th, 1917, in such a way as to raise doubts as to its constitutionality. If, therefore, the act, as construed by the Court of Claims, conflicts with the provisions of the Fifth Amendment of the Constitution of the United States, the construction will be rejected unless absolutely required by the plain language of the statute.

It is submitted that there can be little doubt of the invalidity of this statute as construed by the Court of Claims. The President, in requisitioning the property of the petitioner under the provisions of the act, is exercising the power of eminent domain. If the act is so construed as to deny just compensation to persons whose property is thus taken, it would be unconstitutional. In *Brooks-Scanlon Corp. v. U. S.*, 265 U. S. 106, this Court had before it the very legislation here involved. In discussing the amount to which the petitioner in that case was entitled, this Court speaking through Mr. Justice BUTLER said (p. 123):

> "The contract rights of claimant taken are to be distinguished from its expenditures for the production of the ship. The value of property may be greater or less than its cost; and this is true of contract rights and other intangibles as well as of physical things. It is the property and not the cost of it that is protected by the Fifth Amendment. *Minnesota Rate Cases*, 230 U. S. 352, 454. By the taking, the claimant lost and the United States obtained the right to have the completed ship delivered to it on or before February 1, 1918, upon payment of the instalments remaining to be paid under the contract. It is settled by the decisions of this Court that just compensation is the value of the property taken at

the time of the taking. *Vogelstein & Co. v. United States*, 262 U. S. 337, 340; *United States v. New River Collieries Co.*, 262 U. S. 341, 344; *Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299, 306; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 341. And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added. *Seaboard Air Line Ry. Co. v. United States, supra; United States v. Benedict*, 261 U. S. 294, 298; *Brown v. United States*, 263 U. S. 78.

"Claimant insists that just compensation is the value of the contract and its rights and interests thereunder, and is measured by the difference between the value of the ship, as found by the court, at the time of the taking and on the date specified for delivery, and the amount which claimant was then required under the contract to pay in order to get the ship.

"We think it not permissible so to calculate compensation. It is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy."

The underlying principles are fully explained in *Seaboard Air Line v. United States*, 261 U. S. 299, where it was held that the railroad was entitled to interest on the value of property requisitioned by the President under authority of Section 10 of the Lever Act, Acts, August 10, 1917, c. 53, 40 Stat. at L. 276, notwithstanding the fact that the statute failed to make provision for such inter-

est. This Court, speaking through Mr. Justice BUTLER, said (p. 304):

"The rule is that, in the absence of a stipulation to pay interest or a statute allowing it, none can be recovered against the United States upon unpaid accounts or claims. *United States v. Rogers,* 255 U. S. 163, 169; *United States v. North American Transportation & Trading Co.,* 253 U. S. 330; *United States v. North Carolina,* 136 U. S. 211, 216; *Angarica v. Bayard,* 127 U. S. 251, 260; *Harvey v. United States,* 113 U. S. 243.

"Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. *Monongahela Navigation Co. v. United States,* 148 U. S. 312, 327.

"The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. *Monongahela Navigation Co. v. United States,,* 148 U. S. 312, 327. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. *United States v. Rogers* (C. C. A., Eighth Circuit), 257 Fed. 397, 400. He is entitled to the damages inflicted by the taking. *Northern Pacific Ry. Co. v. North American Telegraph Co.* (C. C. A., Eighth Circuit), 230 Fed. 347, 352, and cases there cited.

"The United States in effect claims that the owner is entitled to no more than the value of the land, as of date of taking, to be paid at a later time, when ascertained. The owner has been deprived of the land and its use since the taking, May 23, 1919. The value of the property, as ascertained by the President, was $235.80, and this was allowed with interest

from date of taking. But as judicially determined later, the value when taken was $6,000.

"The owner's right does not depend on contract, express or implied. A promise to pay is not necessary. None is alleged. This suit is a part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 337; *Searl v. School District, Lake County*, 133 U. S. 553, 562; *United States v. Jones*, 109 U. S. 513, 518, et seq.; *United States v. Sargent*, 162 Fed. 81, 83. It is not suggested in this case that the provisions of Section 10 of the Lever Act do not meet the constitutional requirement. The only question here is whether payment at a subsequent date of the value of the land as of the date of taking possession is sufficient to constitute just compensation."

• • • • •

"It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right and Section 10 of the Lever Act directs payment. The rule above referred to, that in the absence of agreement to pay or statute allowing it the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good

measure by which to ascertain the amount so to be added."

See also:

Phelps v. United States, 274 U. S. 341.

So here, the Act of June 15, 1917, may be construed in such a manner as to provide just compensation to aliens and citizens alike. There can be no question that an alien is entitled to the protection of the Fifth Amendment, regardless of his citizenship. Under the Constitution of the United States the property of no person may be taken for public use without the payment of just compensation therefor.

Wong Wing v. United States, 163 U. S. 228, 242.

Truax v. Raich, 239 U. S. 33, 39.

The Court will recall that the United States did not oppose the granting of the writ of certiorari in this case. However, in the brief of the Attorney General, it was somewhat hesitantly suggested that a judicial remedy might not be necessary to gratify the requirements of the Fifth Amendment. This would seem to conflict with the statement in the *Seaboard Air Line Cases, supra,* that "just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. *Its ascertainment is a judicial function.*" In any event the petitioner in this case, if he be without judicial remedy, is manifestly without any remedy at all. Clearly there can be no representations made on his behalf through diplomatic channels.

Finally it is submitted that the case is governed by the recent decision of this Court in *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331. There Congress, by the Act of July 1, 1918, c. 114, 40 Stat. at L. 704-5, prohibited suits for infringement of patents against contractors who were engaged in furnishing war supplies to the government, and undertook to substitute for such liability a remedy by suit against the United States in the Court of Claims. Prior to that time, Section 3477 of the Revised Statutes had been held to prohibit suits against the government by an assignee of a patent for prior infringement. Suit was brought by an assignee against the United States, relying on the provisions of the Act of July 1, 1918. Section 3477 was held by the Court of Claims to bar the action. That judgment was reversed by this Court. Chief Justice TAFT said (p. 344) (italics ours):

> "It is settled that, but for the Act of 1918 the two assignments vesting title in the Anchor Company would enable it to recover from the contractor for all his infringements (*Crown Die & Tool Co. v. Nye Tool & Machine Works, supra; Gordon v. Anthony*, 16 Blatchf. 234, Fed. Cas. No. 5,605; *Waterman v. Mackenzie*, 138 U. S. 252, 256, 261; *Galer v. Wilder*, 10 How. 476, 494; *Robinson on Patents*, vol. 3, sec. 937, p. 122). If now section 3477 applies and these assignments are rendered void, the effect of the Act of 1918 is to take away from the assignee and present owner not only the cause of action against the Government, but also to deprive it of the cause of action against the infringing contractor for injury by his infringement. The intention and purpose of Congress in the Act of 1918 was to stimulate contractors to furnish what was needed for the War, without fear of becoming liable themselves for infringements to inventors or the owners or assignees of patents.

The letter of the Assistant Secretary of the Navy upon which the Act of 1918 was passed, leaves no doubt that this was the occasion for it. To accomplish this governmental purpose, Congress exercised the power to take away the right of the owner of the patent to recover from the contractor for infringements. This is not a case of a mere declared immunity of the Government from liability for its own torts. It is an attempt to take away from a private citizen his lawful claim for damage to his property by another private person which but for this Act he would have against the private wrongdoer. *This result, if* 3477 *Rev. Stats. applies and avoids the assignment, would seem to raise a serious question as to the constitutionality of the Act of* 1918 *under the Fifth Amendment to the Federal Constitution. We must presume that Congress in the passage of the Act of* 1918 *intended to secure to the owner of the patent the exact equivalent of what it was taking away from him.* It was taking away his assignable claims against the contractor for the latter's infringement of his patent. The assignability of such claims was an important element in their value and a matter to be taken into account in providing for their just equivalent. If section 3477 applied, such equivalence was impossible.

"It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality. *Phelps v. United States*, 274 U. S. 341. Moreover we should seek to carry out in our dealing with the Act of 1918 and Revised Statutes 3477 the very important Congressional purpose of the former, as already explained, in the promotion of the War, as a special legislative intent. *It is our duty to give effect to that special intent although it be not in harmony with a broad purpose manifested in a general statute avoiding assignment of claims against the Government, enacted some eighty years ago. In re Rouse, Hazard & Co.*, 91 Fed. 96, 100, 101; *Townsend v. Little*, 109 U. S. 504, 512; *Washington v. Miller*, 235 U. S. 422,

428. This is in accord with general rules of interpretation, as shown in these authorities, and reconciles section 3477 Revised Statutes and the Act of 1918, if we hold, as we do, that section 3477 does not apply to the assignment of a claim against the United States which is created by the Act of 1918 in so far as the Act deprives the owner of the patent of a remedy against the infringing private contractor for infringements thereof and makes the Government indemnitor for its manufacturer or contractor in his infringements."

(2) The Act Must Be So Construed As To Harmonize With The Principles Of Statutory Construction Adopted By This Court In Considering Similar Legislation.

It will be noted that Chief Justice TAFT, in delivering the opinion in the *Richmond Co. Case, supra,* did not rely solely on the necessity of construing legislation in such a manner as not to conflict with the Fifth Amendment, but stated as a separate ground for decision that limitations expressing broad purposes contained in general acts enacted many years ago, should not be read into special war legislation in such a manner as to limit its remedial character.

This principle is clearly applicable to the present case. As a result of the war emergency, Congress passed many acts conferring extraordinary powers upon the President to appropriate private property. See *United States v. Pfitsch,* 256 U. S. 547, 553. The powers thus conferred upon the President necessitated special care in providing an adequate remedy for the persons whose property should be thus abruptly requisitioned. Each of the acts in question provided such remedies and it has been settled by repeated decisions, that they must be construed in accordance with plain meaning and without regard to gen-

eral acts which might limit or destroy their efficacy. *United States v. Pfitsch, supra; Nassau Smelting Works v. United States,* 266 U. S. 101; *United States v. Skinner & Eddy Corp.,* 35 Fed. (2d) 889.

There can be no doubt but that the provisions of the Act of June 15, 1917, if considered without regard to the limitations of Section 155 of the Judicial Code, confer upon all aliens the right to sue the United States in the Court of Claims. The Act confers the right upon *any corporation* (See R., pp. 8-10). The Act refers to two sections of the Judicial Code, obviously for the purpose of indicating in what forum suit shall be brought. Those sections do not affect the rights of aliens nor do they refer to any other section which does.

Under the original Act establishing the Court of Claims (10 Stat. at L. 612), the right of aliens to sue the United States was recognized, although there was no provision specifically authorizing such suit. The question as to the right of an alien to sue seems first to have been raised in connection with suits brought under the provisions of The Abandoned and Captured Property Act (12 Stat. at L. 820). The first case presenting that point was *Byrnes v. United States,* 3 Ct. Clms. 195, where the Court said (p. 197):

> "Neither is there anything in the Act which limits its benefits to those who are citizens of the United States. It does not require that the claimant should be a citizen but allows 'any person' whose property has been seized and sold to avail himself of the remedy it gives."

See also:

Waltjen's Case, 3 Ct. Clms. 238.
McElhose's Case, 3 Ct. Clms. 240.

These cases gave rise to the passage of the Act of July 27th, 1868 (15 Stat. at L. 243), which expressly took away from aliens the right to sue the United States, with the proviso that

> "This section shall not be construed so as to deprive aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, of the privilege of prosecuting claims against the United States in the court of claims as now provided by law."

This proviso found its way into the Revised Statutes as Section 1068, which, without change, became Section 160, now 155, of the Judicial Code (see Congressional Record, Vol. 46, p. 945). It will thus be seen that Section 155 of the Judicial Code, like Section 3477 of the Revised Statutes discussed in the *Richmond Co. Case, supra,* is *a limiting act,* taking way rights theretofore conferred upon aliens, and is *not an enabling act* as the Court of Claims seems to have supposed.

Section 155, therefore, is a limitation expressing a broad purpose, enacted many years ago, and should not be read into the Act of 1917 in such a manner as to limit its remedial character.

D.

SECTION 155 OF THE JUDICIAL CODE DOES NOT LIMIT THE RIGHT TO SUE THE UNITED STATES TO CITIZENS OF RECOGNIZED GOVERNMENTS.

The history of Section 155 which has just been expounded, makes it clear that this Act did not confer special privileges on aliens, *but took away from certain classes of aliens privileges which had theretofore been conferred upon them.* Were it not for this provision of Section 155, *any alien* might sue the United States in the Court of Claims on the same footing with a citizen. It is, therefore, erroneous to regard Section 155 in the light of an Act conferring a privilege, to be strictly construed. Yet the Court of Claims, not content with applying Section 155 to suits brought under the Act of June 15, 1917, and thus depriving of just compensation many citizens of foreign States with which the United States is on perfectly amicable terms, insisted upon *reading into* Section 155 *an additional limitation* which has the effect of taking away the remedy of the citizen of any Government not recognized by the Government of the United States.

This ruling manifestly affects the rights of a great part of the civilized world; it reads into the statute a limitation not fairly deducible from its language; it deprives of all judicial remedy, private persons who are *ex hypothesi* without remedy through diplomatic channels; it falls upon friend and foe alike. *It deprives of all remedy against confiscation,* citizens of States with which we have declined to establish diplomatic relations *because of the confiscatory nature of their laws*—an ironical result.

The decisions of this Court have condemned the practice of importing into an Act of Congress seriously affecting international relations, words which it does not contain. In the *Three Friends*, 166 U. S. 1, a vessel was forfeited to the United States under Section 5283 of the Revised Statutes, authorizing the forfeiture of any vessel fitted out or armed with the intent that it should be employed in the service of any foreign people, or to cruise or commit felonies against the subjects, citizens or property of any foreign people with whom the United States are at peace. The vessel in question was alleged to have been furnished, fitted out, and armed with intent to employ it in the service of certain people engaged in armed resistance to the Spanish government in the Island of Cuba. The Government of the United States had not recognized the belligerency of the Cuban insurrectionaries and the proposition was advanced that in the absence of such recognition the statute did not apply. Mr. Chief Justice FULLER, speaking for this Court, said (pp. 63-64, 65-66):

> "Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations, recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. *The Ambrose Light*, 25 Fed. Rep. 408; 3 Whart. Dig. Int. Law, Sec. 381; and authorities cited.
>
> "But it belongs to the political department to determine when belligerency shall be recognized and its action must be accepted according to the terms and intention expressed.
>
> "The distinction between recognition of belligerency and recognition of a condition of political re-

volt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred.

"We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it cannot be doubted that, this being so, the act in question is applicable.

"We see no justification for importing into section 5283 words which it does not contain and which would make its operation depend upon the recognition of belligerency; and while the libel might have been drawn with somewhat greater precision, we are of opinion that it should not have been dismissed."

E.

IF PETITIONER'S RIGHT IS DEPENDENT UPON SECTION 155 OF THE JUDICIAL CODE PETITIONER SHOULD BE PERMITTED TO ESTABLISH AS A MATTER OF FACT THAT THE PRESENT RUSSIAN GOVERNMENT ALLOWS SUITS TO BE BROUGHT AGAINST IT BY CITIZENS OF THE UNITED STATES.

Assuming that Section 155 of the Judiciary Code applies to this action, it is incumbent on petitioner to prove as a matter of fact that the government of which it is a citizen "accords to citizens of the United States the right to prosecute claims against such government in its courts." While, of course, it is logically necessary to such proof that a government exists of which petitioner be a citizen, nevertheless, *it is not the existence of such government which is the issue to be established, but the rights allowed in the courts of such government to citizens of the United States.*

This distinction is emphasized because the failure to grasp the same seems responsible for the decision in the Court below. The Court of Claims seemed to believe that to allow this suit to continue would require a judicial determination that the Union of Soviet Socialist Republics was the government of Russia. It was assumed that this could not be done without infringing upon the rights of the State Department. Obviously a judicial determination that the Soviet Government is the government of Russia might in some cases infringe upon the prerogative of the State Department. It would do so if the issue before the Court were concerning the sovereign acts of such government and the existence of the government as

a sovereign entity were called upon in order to validate such acts.

However, a judicial determination that there was in fact a government in Russia known as the Union of Soviet Socialist Republics and that such government as a matter of fact carried on the ordinary functions of any civilized government, is not in the least an infringement upon the prerogatives of the State Department.

Numerous authorities exist which have made this distinction clear and which have pointed out that *where no question of sovereignty as such is involved,* the Court may consider the actual facts.

In this Court the matter was first discussed by Chief Justice MARSHALL in *United States v. Palmer,* 3 Wheaton 610. The great Chief Justice there pointed out certain circumstances under which the existence of an unacknowledged government could be proved as a matter of fact. He pointed out that persons acting under the authority of such unacknowledged government could prove this to justify their acts of war. In the following year similar views were expressed by Judge JOHNSON on Circuit, in the matter of *Consul of Spain v. La Conception,* Fed. Cases 3137. He said that courts exercising jurisdiction of international law "were often called upon to deduce the fact of national independence from history, evidence or public notoriety where there has been no formal recognition."

Similar views were expressed at about this time by Lord Chief Justice BEST of England in *Yrissari v. Clem-*

ent, 3 Bing. 432. He called attention to the existence of sovereign states not acknowledged by any government, as Japan and Siam, and stated that the existence of such states must be proved by evidence.

After the Civil War this Court decided in a large number of cases that for many purposes the Confederate States must be admitted to have possessed governmental powers, and that to a certain extent the acts of such state government would be deemed valid. See *Texas v. White*, 7 Wallace 700; *Thorington v. Smith*, 8 Wallace 1; *United States v. Insurance Companies*, 22 Wallace 99; *Williams v. Bruffy*, 96 U. S. 176; *Baldy v. Hunter*, 171 U. S. 388.

In *MacLeod v. United States*, 229 U. S. 416, this Court held the insurgent Philippine government to be for the purposes of that case such a *de facto* government that custom duties paid to it would bar a collection by the United States government thereafter of the same duties.

There has been no more recent expression of opinion by this Court on the subject, but in recent years the Court of Appeals of the State of New York has had occasion to review the earlier cases and express certain views arising directly out of the situation existing in Russia.

It was held for instance in *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, that no suit could be maintained against an unrecognized government. The Court in that case had no difficulty in considering the fact that there was a government in Russia. The Court pointed out that whether or not a government existed within a given territory was a fact and not a

theory, and that such government was not created by recognition. That whether or not there was a government in existence was a question to be determined by the known facts and was not dependent upon recognition was further held by the same Court in *Nankivel v. Omsk All Russian Government,* 237 N. Y. 150.

Chief Judge CARDOZO in *Sokoloff v. National City Bank,* 239 N. Y. 158, stated that for certain purposes even the decrees of an unrecognized government might be given effect. He said:

> "Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War."

The subject was further considered in *Russian Reinsurance Company v. Stoddard,* 240 N. Y. 149; *Joint Stock Company of Volgakama and Chemical Factory v. National City Bank,* 240 N. Y. 368 and in *Petrogradsky Bank v. National City Bank,* 253 N. Y. 23. In all these cases the Court found no difficulty in discussing the existence of a government in Russia and did not deem such discussion precluded by the non-recognition on the part of the United States government.

Some of these authorities were reviewed by Judge GODDARD in the District Court of the United States for the Southern District of New York in the very interesting case which arose out of the shipment to the United States of gold belonging to the State Bank of the Soviet

Republic. The Bank of France sought to recover this gold as belonging to it. Certain defenses were interposed by the American banks into whose possession the gold had come, some of which relied on the acts of the Soviet government. Most of these defenses were held valid in *Banque de France v. Equitable Trust Company,* 33 Fed. (2d) 202. Judge GODDARD pointed out that our own government recognized that as a matter of fact a government existed in Russia, instancing the requirement in naturalization proceedings that an applicant for citizenship forswear allegiance to "the present government of Russia."

Indeed the Court of Claims itself in an earlier case seems not to have been troubled by the question upon which it decided the case at bar. In *Rossia Insurance Company v. The United States,* 58 Court of Claims 180 (1923), an attempt was made on the part of the petitioner in that case to show that the reciprocal right to sue the Russian government was granted to citizens of the United States by the Kerensky government, the last government recognized by the United States. The petitioner in that case wrongfully assumed that under the laws of the Soviet government there was no such reciprocity and sought to take advantage of the presumption that in the absence of recognition of a new government the old will be deemed to continue. The Court, however, held that such presumption was overcome by the notorious fact that the Soviet government had displaced the Kerensky government. The Court said that the question depended "upon the ascertainment of an existing and easily provable fact." That language would seem to be entirely applicable to the case at bar. The situation is exactly the same as in the Rossia Insurance case, except that the

petitioner in this case believes that it can establish the necessary reciprocity whereas the petitioner in the Rossia case felt unable to do so.

Practically all of the writers who have had occasion to discuss this subject have come to the same conclusion, namely, that in admitting the existence of a government for the purpose of determining private rights, the prerogative of the State Department is in no way infringed. It is only when the case deals with sovereignty itself and the effects flowing from an act of sovereignty that recognition becomes important. Even then, as some of the cases cited indicate, principles of justice may require giving effect to the acts of an unrecognized government to a limited extent.

Hervey, *Legal Effects of Recognition in International Law,* (1929);

Dickinson, *The Unrecognized Government or State in English and American Law,* 22 Mich. L. R. 29;

Fraenkel, *The Juristic Status of Foreign States, etc.,* 25 Col. L. R. 544;

Connick, *The Effect of Soviet Decrees in American Courts,* 34 Yale, L. J. 499;

Houghton, *The Validity of The Acts of Unrecognized Governments, etc.,* 13 Minn. L. R. 216;

35 Harvard, L. R. 607, 768; 37 Id. 606; 38 Id. 816, 832; 39 Id. 127; 41 Id. 102; 35 Yale L. J. 98, 150, at 155; 30 Col. L. R. 226.

It is also submitted that none of the cases cited by the Court of Claims in its opinion have any application to the

situation here presented. Chief reliance is placed upon the case of *Kennett v. Chambers*, 14 Howard 38. That case presented the question of a revolting community. It is obvious that until either the parent state or the home government has recognized the independence of the revolting community, the Courts cannot for any purpose recognize its independence. To do so would obviously embarrass the foreign relations of the home government. It would be absurd, however, to argue that such revolting community had no government at all and the case relied on by the Court of Claims did not pretend to decide this. It merely held that a contract for the purpose of assisting an insurrection in Texas was invalid because at the time it was made the independence of Texas had not been recognized. In other words, such contract was a violation of the neutrality of the United States.

Of the other cases cited by the Court of Claims it may be pointed out that the *United States v. Palmer*, 3 Wheaton 610, already discussed, also deals only with the question of neutrality. The same is true of *The Nueva Anna*, 6 Wheaton 193. *Jones v. United States*, 137 U. S. 202, actually has nothing to do with the subject of unrecognized governments. The only question in this case was whether a certain territory was within the United States or not. The Court held that it was bound by a declaration of the executive that such territory was within the United States. *Matter of Penza*, 277 Fed. 91, dealt only with the right of a representative of the Soviet government to recover possession of vessels. The Court held that no representative of the Soviet government could be

considered as having Ambassadorial powers, the State Department not having recognized such government. The Court did not intend to say that there was no government in Russia.

The various quotations from all these cases contained in the opinion of the Court of Claims, of course, lay down sound rules. They all deal, however, with the general question as to when the sovereign existence of a government will be admitted by the Court.

But none of the cases has any application to the problem here presented, namely, can petitioner show the existence of a system of Courts and a set of laws of the state of which it is a citizen which allow suits by citizens of the United States against such government? To permit proof of these facts does not require a holding that the Soviet government is a sovereign government whose acts are binding as though the government had been recognized; it does not require any determination whatever as to the character of the Soviet government, except the holding obvious and notorious that there has existed in Russia since 1917 a regime actually functioning in the territory of that state, maintaining armies, carrying on war, passing laws which are obeyed by the people within the territory, maintaining courts, entering into treaties with foreign nations and generally performing all the acts of a government.

The Courts must always remain free to determine questions of fact as they arise. No theory of prerogative on the part of the executive can interfere with this supreme right of the Courts. It is, of course, true that in cases in-

volving sovereignty (which is a conception partly factual and partly political) policy requires that the political exigency of the situation be supreme over the facts. But where no question of sovereignty is involved, no political infringement can arise, and the Court is only concerned with private rights, then the facts must be supreme. Such facts petitioner in this case has been deprived of its right to show.

CONCLUSION.

It is respectfully submitted that the judgment in this case must be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1929

RUSSIAN VOLUNTEER FLEET, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provision and statutes involved	2
Statement	4
Argument	5
Conclusion	6

CITATIONS

Cases:	
Bauman v. *Ross*, 167 U. S. 548	6
Davis v. *Newton Coal Co.*, 267 U. S. 292	6
Monongahela Navigation Co. v. *United States*, 148 U. S. 312	6
Richmond Screw Anchor Co. v. *United States*, 275 U. S. 331	5
United States v. *New River Collieries*, 262 U. S. 341	6
Statutes, etc.:	
Fifth amendment	2
Judicial Code, Sec. 145 (U. S. C., Title 28, § 250)	2
Judicial Code, Sec. 155 (U. S. C., Title 28, § 261)	3
Act of June 15, 1917, c. 29, 40 Stat. 182, 183	3

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